No. 15,940

United States Court of Appeals

For the Ninth Circuit

OTIS, MCALLISTER & Co., a corporation, *Appellant,* vs. SKIBS, A/S MARIE BAKKE, *Appellee.*	}

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Appellee's argument is built upon wish instead of fact. It states that there was (1) no new language in Cogsa affecting valuation clauses, and (2) no hint in the legislative history that a change in prior law was intended. From these false premises appellee draws the conclusion that the rule under the Harter Act continues to apply, and that the cases construing Cogsa are simply wrong. The erroneous statements of fact and theory by which appellee attempts to justify its position cannot evade the issue presented for decision.

I.

THE LANGUAGE OF COGSA ON WHICH APPELLANT RELIES IS NOT SIMPLY A REENACTMENT OF THE HARTER ACT.

Appellee professes to see no difference whatever between the two statutes which is material to the issues in

this case. Such wishful thinking cannot change the facts. The changes are there and they are substantial, as pointed out in our opening brief (pp. 7-10). One of the evils which Congress was asked to correct was the practice of using bill of lading clauses to restrict cargo recoveries to less than the full loss suffered. In Section 4(5) Congress enacted a statutory clause on valuation of cargo, thereby preempting the field and depriving the carriers of their pre-existing power to control the subject by bill of lading clauses. Having done that, Congress then made its intention clear by providing in 3(8) that no other device lessening the carrier's liability would be permitted. Regardless of appellee's claimed inability to understand it, the statutory change is clear and has been noted and applied by the cases cited in our opening brief.

On page 11 of its brief appellee states that "The decisions under the Harter Act have given meaning to the words reenacted in Section 3(8) of Cogsa and are applicable to the same words of Cogsa." Appellee cites as authority for this proposition *The Bill,* 47 F. Supp. 969, and *Spencer Kellogg & Sons v. Great Lakes Transit Corp.,* 32 F. Supp. 520. The references are incorrect and seriously misleading. Neither opinion discussed or mentioned 3(8) at all. Valuation clauses were not in issue. The cases merely held that the phrase "due diligence" should be given the same meaning in Cogsa as the identical phrase had in the Harter Act, a proposition with which we agree, but which is irrelevant to the present inquiry. Similarly, the *Esso Belgium,* 343 U.S. 236 (Br. 8), and *Scarburgh v. Compania Sud-Americana de Vapores,* 174 F. 2d 423 (Br. 11), cited by appellee in

support of the similarity between the two statutes, have meaning only when considered in light of the issues there involved. Neither case was concerned with 3(8) or 4(5), and the dicta quoted by appellee are comments of the most general nature, having nothing to do with the particular issues of this case. The dubious authorities which appellee cites emphasize the complete lack of case law in support of its theory.

II.

THE LEGISLATIVE HISTORY SHOWS THAT CONGRESS WAS CONCERNED WITH A GENERAL PROBLEM, AND DID NOT DIFFERENTIATE BETWEEN PARTICULAR CLAUSES.

Any discussion of legislative history should be unnecessary in this case, since the meaning of the Act is apparent from the language of Sections 3(8) and 4(5). The statute is not ambiguous. It prescribes in detail what the carrier can and cannot do. Reference to its history under such circumstances is neither necessary nor proper.

Ex parte Collett, 337 U.S. 55, 69 S. Ct. 944, 959, 93 L. ed. 1207 (1949);

Gemsco v. Walling, 324 U.S. 244, 65 S. Ct. 605, 89 L. ed. 921 (1945).

Nevertheless, we welcome the opportunity to discuss the history of Cogsa, since such discussion can demonstrate the artificiality of appellee's theories.

Appellee's approach to the problem of legislative history requires us to assume:

(1) that there is and was a distinct and well-recognized difference between "valuation" clauses and "limitation" clauses,

(2) that the two types of clauses, and the differences between them, were explained to Congress, and

(3) that Congress thereafter deliberately chose to outlaw one type but not the other, even where the effect of each would be the same.

Assuming that the requirements, operation and validity of valuation clauses, as opposed to limitation clauses, were ever clearly understood, there is no evidence that the distinctions were pointed out to Congress. In truth, it would have been difficult to do so, since those questions were still being litigated during and after the years when Congress held hearings on the proposed Hague Rules legislation. In deciding the *Ansaldo San Giorgio,* 294 U.S. 494, 55 S. Ct. 483, 79 L. ed. 1016 (1935), the Supreme Court was careful to leave open the validity of a valuation clause where no choice of rates was tendered. Later, in the *Ferncliff* litigation, the Court of Appeals for the Fourth Circuit was "divided and in doubt as to the validity of such a clause" even under the Harter Act, and found it necessary to certify the question to the Supreme Court. (See 306 U.S. at p. 447, 59 S. Ct. at p. 616, 83 L. ed. at p. 865.) What Congress *was* told at the hearings was that "valuation clause" questions were a fruitful source of litigation, to which the proposed Act would put a stop (Letter from Arnold W. Knauth to Hon. Schuyler O. Bland, reported in *Hearings before the Committee on Merchant Marine and Fisheries,* House of Representatives, 74th Congress, Second Session, on S. 1152, page 88). Mr. Knauth referred to the fact that at least 52 valuation clause cases had been contested in American courts during the preceding thirteen years, as compared

to only one such case in England under Hague Rules legislation. He pointed to the effect of the British Cogsa as having "swept all this sort of technical bickering into the scrap heap" and urged the adoption of the American Cogsa on the ground that he was weary of "seeing the merits of cases go unheard while we wrangle about new varieties of value, notice, and suit clauses" (*Hearings,* supra, p. 88).

To accept appellee's fairy tale version of congressional intent we must assume that Mr. Knauth was talking about a "limitation clause" when he used the phrase "valuation clause," and that Congress knew it. Such a suggestion is preposterous. Neither Mr. Knauth nor anyone else appearing at the hearings cited by appellee differentiated between types of clauses or intimated that the Act would strike at only half of the problem created by the various types then in use. It was the problem itself—the necessity of accepting less than full legal damages because of bill of lading clauses—of which cargo interests complained, and which Congress remedied in enacting the Hague Rules into law.

The following remarks, in addition to those of Mr. Knauth, show the need for and the intent of the proposed legislation as explained to Congress. The emphasis is ours but the words are taken from the hearings and reports:

1. In the Senate Committee hearing, on May 10, 1935, Mr. A. B. Barber of the United States Chamber of Commerce appeared in support of the bill and submitted a pamphlet setting out the proceedings of the 1930 Conference on Uniform Ocean Bills of Lading. The Conference

had analyzed the effect of the Hague Rules legislation as follows:

> "H. R. 3830 imposes a liability of $500 per package or customary freight unit upon the carrier, with the privilege of stipulating a higher *valuation* if agreeable to both parties, and no *valuation clause* will be valid which limits the carrier's liability to a sum less than that amount. *(Hearing before the Committee on Commerce,* United States Senate, 74th Congress, First Session, on S. 1152, page 37.)

2. During the 1936 hearings before the House Committee, a memorandum was submitted on behalf of the American Steamship Owners' Association stressing the advantages to be gained by shippers. One of these was described as "increased valuations":

> "*Valuation clauses* in bills of lading frequently restrict the recovery of the cargo owner to an *agreed valuation* as low as $100 per package.
>
> "Section 4(5) of the bill increases the *valuation* to $500 per package or per customary freight unit." (*House Hearings,* supra, p. 60.)

3. On page 8 of *House Report No. 2218,* submitted by the Committee following the hearings, Chairman Bland paraphrased the above language in referring to *"valuation clauses"* and *"agreed valuation."*

4. Mr. Barber appeared before the House Committee in 1936 and explained Section 4(5) as guaranteeing that shippers would recover $500 or the "actual value" of the goods, if less than that amount:

> "That does not mean they will get $500 for every package, *but they will get the value, if it is within $500 . . ." (House Hearings,* supra, p. 25).

5. Before taking testimony from the witnesses in 1936, the House Committee received an official memorandum from the Department of Commerce. That lengthy statement analyzed the "maximum value" feature of the bill and concluded that it

> *"prohibits the fixing by contract of even the actual value if that is under $500" (House Hearings,* supra, p. 14).

The Commerce Department memorandum, unchallenged by any carrier representative, advised the Committee that Cogsa would prohibit the very type of clause which appellee now seeks to defend.

Appellant submits that the climate in which Congress enacted Cogsa becomes clear from the foregoing references. The difficulty with which a shipper could determine his rights, because of the multitude of clauses appearing in fine print, was explained to the Committees and to Congress *(House Hearings,* supra, pp. 2, 8-9, 25; *House Report,* supra, pp. 6-7). One type of such clause, indiscriminately referred to by the terms "valuation," "limitation," "agreed value," and "limit of liability," was that which prevented the shipper from recovering his full legal damages. Congress was told that such clauses were a continual source of trouble to the shipper and the courts, which the passage of Cogsa could be expected to cure. It was explained that the new Act protected the carrier against liability in excess of $500 per package. Up to that amount the shipper was guaranteed his full actual loss and contractual stipulations regarding value were prohibited.

Appellee's reliance on the lack of particular discussion regarding 3(8) is misplaced. That section, *by itself,* is meaningless. Only when it is related to 4(5) and other *definitive* sections of the Act does it take on meaning at all. Then it becomes clear that 4(5) was to be *the* valuation clause and that all others which "lessened" the carrier's liability were prohibited.

III.

APPELLEE'S CLAUSE IS NOT THE SAME AS THAT APPROVED IN THE FERNCLIFF.

Implicit in appellee's argument that this case is controlled by the *Ferncliff* and other Harter Act decisions is the assumption that its clause is the same as those in use prior to Cogsa. Actually there is a difference, and the difference emphasizes the change wrought by the 1936 Act. The *Ferncliff* clause provided simply for a valuation based on invoice plus disbursements. Presumably the consignee would be paid on the basis of the invoice, no matter what the price. Appellee's bill of lading, however, is not so simple (Tr. 36). Clause 17 says that goods worth more than $500 per package are valued at $500, while clause 18 says that goods worth less than $500 per package are valued at invoice plus charges. In other words, appellee recognizes the Cogsa valuation scheme when it would work to its own advantage, but seeks to avoid it when cargo might benefit.

Congress could not have intended the valuation provisions to be a one-way street. One of appellee's own cases, *The Bill,* 55 F. Supp. 780 (Br. 21-23), held that a valuation clause could not be given effect when to

do so would afford *cargo* an advantage in conflict with the Act. By the same token this Court should not allow the *carrier* to gain an advantage by a clause not authorized by the Act.

The wisdom of Congress in enacting a standard valuation clause and outlawing all others is remarkably portrayed by the complex language of clauses 17 and 18, and by the example appearing on page 6 of appellee's brief. Appellee states that if the market value at destination is either $450 *or $530,* clause 18 would be applied to fix a value of $490 for the purpose of calculating damages. That is an obvious error, since clause 18 by its own terms can never apply where the actual value is over $500. It typifies the pitfalls against which Cogsa protects. What chance has the consignee to understand a bill of lading when the carrier's own counsel cannot?

IV.

APPELLEE CITES NO CASES DEALING WITH THE VALIDITY OF AN INVOICE VALUE CLAUSE UNDER COGSA OR WITH THE MEANING OF "LESSEN" LIABILITY AS USED THEREIN.

Appellee makes no effective answer to the Cogsa cases, all of which are against it.

A. The valuation clause cases.

Only two decisions have passed on the validity of valuation clauses under Hague Rules legislation. Both squarely hold such clauses invalid. They are *The Harry Culbreath,* 1952 A.M.C. 1170, and *The Cape Corso,* 1954 Lloyd's Law List Reports, Vol. II, p. 40, discussed in our opening brief on pages 15 through 19. Appellee,

finding no contrary holdings, states merely that these cases are wrong, and that the decision of the District Court herein is entitled to greater weight.

We invite the Court to compare the *Harry Culbreath* and *Cape Corso* opinions with those of Judges Hamlin and Goodman below. The reasoning in the *Harry Culbreath* is set forth in an eight-page opinion which discusses virtually all of the cases appearing in the briefs on file herein. Three years later the Vancouver judge in the *Cape Corso* reached the same decision by the same logical route, reasoning independently of the *Harry Culbreath,* which apparently was not cited to him. By contrast, Judge Hamlin's law and motion order, overruling exceptions to the answer, contains but a single sentence dealing with clause 18 (Tr. 30), while Judge Goodman's approach to the case is indicated by this statement that "It would be unseemly to, in effect, reverse the decision of a brother judge" (Tr. 40). Neither judge below cited or discussed any authorities on the point at issue.

Appellee (Br. 21) seeks to dismiss the Supreme Court dictum in *The Ferncliff,* to the effect that valuation clauses are regulated by Cogsa, by pointing out that the words used are those of District Judge Chestnut. In our view it is significant that the Supreme Court believed those words worthy of repeating, especially after it complimented the District Judge on his "careful opinion" (306 U.S. at p. 449, 59 S. Ct. at p. 617, 83 L. ed. at p. 866).

Again on page 21, appellee is in error in attributing to Judge Chestnut language said to be in apparent con-

flict with his definite statement that valuation clauses were governed by Cogsa. Whatever is meant by the quoted language ("Notwithstanding the passage of the Carriage of Goods by Sea Act . . .") the words are not those of Judge Chestnut, as stated by appellee, but appear in the Statement of Facts certified by the Court of Appeals (306 U.S. at p. 447, 59 S. Ct. at p. 616, 83 L. ed. at p. 865). They are therefore useless in interpreting Judge Chestnut's intent or for the purpose of weakening the effect of his clear dictum which was adopted by the Supreme Court and relied upon in subsequent decisions.

B. The cases on the meaning of "lessen such lability".

One of the few realistic statements in appellee's brief is the admission (pp. 25-26) that it would be useless to discuss *The Campfire,* 156 F. 2d 603, or *The Exiria,* 160 F. Supp. 956, 1958 A.M.C. 439. We agree that it would be useless from appellee's viewpoint, since those cases stand unchallenged as holding that the "lessening" prohibited by 3(8) includes a lessening of the dollar amount which the carrier has to pay. Appellee meets this obstacle by closing its eyes. If a pro-rata clause lessens liability, so does the invoice value clause, and appellee cannot avoid that conclusion by the lame statement that those decisions "have nothing to do" with this case (Br. 27).

C. Appellee's authorities.

Appellee cites two Cogsa cases involving bill of lading clauses affecting measure of damages. They are *The Steel Inventor,* 35 F. Supp. 986, and *The Bill,* 55 F. Supp. 780 (Br. pp. 21-23). It is difficult to understand what comfort

appellee derives from either. In *The Steel Inventor* Judge Chestnut was careful to express no opinion on the validity of a valuation clause, even by way of dictum, since the point was not necessary to the decision of that case. The clause involved was void even under Harter Act principles. In *The Bill,* as discussed earlier herein (supra, pp. 8-9), he held that a valuation clause would not be permitted to override the express provisions on the subject of recoverable damages which appear in the Act.

Appellee cites no cases upholding any valuation or limitation clause in a Cogsa bill of lading, or casting any doubt on the statutory construction found in *The Harry Culbreath, The Cape Corso, The Campfire* or *The Exiria.* Instead, it resorts to vague implications such as "The meaning of the words of Cogsa as interpreted by the Supreme Court does not invalidate agreed valuation clauses" (Br. 3). No reference appears to the case or cases appellee had in mind in making that statement. Actually *The Ferncliff* is the only Supreme Court decision which has "interpreted" the effect of Cogsa on valuation clauses, and the language in that opinion is in appellant's favor.

The text authorities cited by appellee (Br. 25) require brief comment. Mr. Knauth, gratuitously described as the "leading authority" on ocean bills of lading in the United States, is well known to be a champion of shipowner interests whose published comments, though often wrong, seldom err in favor of cargo. For example, his Second Edition, published in 1941, stated that both the pro-rata clause and the both-to-blame clause were valid under Cogsa (*Knauth on Ocean Bills of Lading,* 2d ed. pp. 157-

160, 208). On these clauses, of course, he was proved wrong by *The Campfire* in 1946 and *The Esso Belgium* in 1952. It would seem that history is repeating itself, this time with regard to the invoice value clause. In his current edition Mr. Knauth, while expressing his personal opinion in favor of the clause, admits that the cases are going against him:

> "... several district courts have regarded the invoice value clause as a device 'lessening' the carrier's liability in contravention of Cogsa Section 3(8). . . ." (*Knauth,* supra, 4th ed. p. 279).

Appellant submits that Mr. Knauth's opinions, admittedly contrary to the case law, are worthy of no weight whatsoever in view of his 1936 statement to Congress that Cogsa would sweep into the scrap heap all technical bickering over forms of valuation clauses (*House Hearings,* supra, p. 88).

The Fourth Edition of *Poor on Charter Parties and Ocean Bills of Lading,* relied upon by appellee, conflicts with the Third Edition, published in 1948. The earlier work, revised by Raymond T. Greene, referred to valuation and limitation clauses on page 160, stating that:

> "Prior to 1936 the courts enforced both types of clauses and if the bill of lading were not subject to the Carriage of Goods by Sea Act would presumably still do so."

Further discussion is concluded on page 162:

> "The type of clause approved by the *Ferncliff* decision would seem to be prohibited by the Carriage of Goods by Sea Act."

The only judicial development in the ensuing six years was *The Harry Culbreath* in 1952, which made a prophet of Mr. Greene. Yet in his Fourth Edition, published in 1954, Mr. Poor offers the following (at p. 184):

> "It is to be *hoped* that this clause will not be held invalid under Section 1303(8)." (Emphasis added.)

Mr. Poor is too conscientious a lawyer to publish the above wish as an opinion. His expression of it as a "hope" is consistent with his position as a partner in the noted New York admiralty firm of Haight, Gardner, Poor and Havens, which engages primarily in the representation of shipowners' interests. It is only natural for Mr. Poor to defend the invoice value clause, since his partner, Mr. Charles S. Haight, was on the committee which drafted the original clause and recommended it to various steamship lines in 1937 (see *Knauth,* supra, 4th ed., pp. 93, 106-107).

The manner in which Mr. Knauth and Mr. Poor express their comments brings them within the scope of the Supreme Court warning that

> "Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." (*The Paquete Habana,* 175 U.S. 677, 700, 20 S. Ct. 290, 299, 44 L. ed. 320, 329 (1900).)

The final authority on which appellee relies is *The Carriage of Goods by Sea Act, 1924* published in 1932 by A. J. Hodgson. The author was writing in reference to the English statute, some four years before Cogsa was

enacted, and at a time when, to our knowledge, there were no cases on the validity of valuation clauses under The Hague Rules. For a more recent statement by an English author we refer to *Cole: The Carriage of Goods by Sea Act, 1924,* 4th ed. 1937, which analyzes the intent of 4(5) as follows (p. 85):

> "Under the above Art. IV, 5, of the Rules, a loophole which existed in the Harter Act and similar legislation (with the exception probably of the Canadian Act) was closed. The Rules in effect embody a suggested amendment of the Harter Act which was the subject of discussion in American shipping circles. The object of this amendment was to negative decisions of the American courts that, notwithstanding the provision in the Harter Act declaring it illegal for shipowners to contract out of liability, it was nevertheless lawful for the parties to agree upon a value for the goods, by which means shipowners effectively limited their liability for losses to cargo."

Additional English comment is found in the latest edition of *Scrutton on Charterparties and Bills of Lading,* 16th ed. (1955), pp. 480-481, where the author states that agreed value clauses "would appear to lessen the maximum liability provided by Art. IV, Rule 5, and thus to be rendered null and void" by Art. III, Rule 8 (Section 3(8) of Cogsa).

To summarize appellee's authorities, they consist of (1) no cases involving invoice value clauses under Cogsa or construing the phrase "lessen such liability," (2) three text writers: Mr. Knauth, who admits the cases to be against him; Mr. Poor, whose Fourth Edition conflicts with his Third; and Mr. Hodgson, writing in England four

years before Cogsa was passed. If these be "authorities" at all, surely they must yield to the square judicial holdings with which they conflict.

The existence of prior decisions by other Courts on the very clause at issue points up a practical problem involved in this appeal. Unless the decision below is reversed, it will be possible for a vessel to discharge shipments at Vancouver, San Francisco and New York under identical bill of lading clauses which would be valid here but void in the other two jurisdictions. Such a situation would promote forum shopping, would destroy the uniformity which the Rules and the Act were designed to achieve, and should be avoided if reasonably possible.

V.

THE CUSTOM DEFENSE HAS DISAPPEARED FROM THE CASE.

At the pleading stage and at the trial, appellee insisted that an alleged "custom" of invoice value settlements afforded it a separate and independent defense, regardless of the validity of clause 18 in the bill of lading. Appellee now admits (Br. 28) that its stand was untenable, and that no custom can override a statutory prohibition. The custom argument has, therefore, disappeared from the case, in spite of appellee's claim that it somehow shows how wonderful invoice settlements are and how happy everyone is with them. Cargo interests are not happy or this case would not be here, nor would the American Institute of Marine Underwriters have moved

for leave to file a brief as amicus curiae. It should be sufficient to note that whenever an invoice value or similar clause has been attacked in court, the attack has come from the side of cargo. Moreover, the inferences which appellee seeks to draw on pages 28 and 29 of its brief are patently irrelevant, since the feelings of a group of West Coast coffee carriers and importers can hardly bear on the intent with which Congress passed the Act in 1936.

VI.

A DECISION FOR APPELLANT WILL EFFECTUATE CONGRESSIONAL INTENT AND ACHIEVE UNIFORMITY UNDER COGSA AND THE HAGUE RULES.

It is a fact, and not an ''archaic'' suggestion as labeled by appellee (Br. 27), that the content of bills of lading is dictated by the carriers. That is only natural, since the carriers prepare the forms. The authorities quoted on pages 21 through 23 of our opening brief recognize the continuing truth of that fact in connection with post-Cogsa bills of lading. If additional evidence is required, one need only refer to appellee's own bill of lading (Tr. 36). Of its twenty-nine numbered paragraphs, *not one* bestows a right, benefit or privilege upon the shipper or consignee. All were drafted for the carrier's advantage, in language which methodically claims for the ship every benefit possible under the law, and more, including the admittedly void ''both-to-blame'' and ''pro-rata'' clauses (clauses 9 and 17). There is no bargaining over bill of lading clauses when a shipment is tendered. The carrier

will permit none, lest it be charged with discriminating between shippers.

Appellee's reference to the trade associations which have supported shippers' interests betrays a lack of perspective. Their part in the play is finished; they have left the stage. It was their function to generate the pressure for statutory reform and to acquaint Congress with the complaints and desires of their members. This they have done and done well, but the lobbyist is of no value to his client in the "day-by-day commercial transactions" of his business. The Chamber of Commerce can argue the shipper's cause before Congressional committees, but it cannot hold his hand when he appears at the steamship office and asks for his bill of lading. When those who draft the bills of lading persist in relying on invalid clauses, it is to the courts that the consignee must turn to secure the relief guaranteed him by the 1936 Act.

By its reference to *Halcyon Lines v. Haenn Ship Ceiling Corp.*, 342 U.S. 282, 72 S. Ct. 277, 96 L. ed. 318, and *The Esso Belgium* (Br. 30), appellee intimates that there is a parallel between those cases and this. That is not true. The statutes there involved, and their legislative history, were utterly wanting in any hint of Congressional intent on the points at issue. Under those circumstances it would have been judicial legislation for a Court to read into the statutes things which were not there and had not been considered. Contrast that situation with what exists here. There is no mystery about the effect of Cosga on valuation clauses. The effect is stated in the Act and is made doubly apparent by the legislative history. In that setting this Court has not only the right but the duty to

declare clause 18 invalid. That decision, by bringing the law in this Circuit into agreement with the rules already announced in New York and Canada, will insure the federal and international uniformity so clearly intended by the Carriage of Goods by Sea Act and the Hague Rules.

Dated, San Francisco, California,
July 30, 1958.

Respectfully submitted,
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